

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL MISCELLANEOUS CAUSE NO. 276 OF 2016
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

TUSIIME DOREEN ::::::::::::::::::::::::::::::::::: APPLICANT

Versus

KAMPALA CAPITAL CITY AUTHORITY ::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING:

This application is brought by Notice of Motion under section 36(1) (a) and (c) of the Judicature Act, Article 42, seeking for ;

- a) A declaration that the respondent's decision dated 29th July 2016 is illegal and inconsistent with Article 42 and 21 of the Constitution of the Republic Of Uganda.
- b) A declaration that the respondent's decision dated 29th July 2016 is unreasonable as was held in **Associated Provincial Picture House LD Vs Wednesbury Corporation [1947] 7 ALL ER.**
- c) A declaration that failure by the respondent to adhere to its mandatory obligation to issue an appointment letter within one month from the date of approval of the appointment under Rule 29 (1) of the Public Service Commission Regulations SI No. 1 of 2009 amounted to an illegality.
- d) An order of certiorari doth issue quashing the respondent's decision of halting the deployment of the applicant as officer prosecution at Kampala City Council Authority and that the said decision is ultra vires and void abinitio.
- e) An order of certiorari doth issue quashing the respondent's decision of halting the deployment of the applicant sine die for being unreasonable in Wednesbury's sense.

- f) An order of mandamus doth issue compelling the respondent to deploy the applicant forthwith as officer prosecution at Kampala Capital City Authority without any further delays.
- g) A declaration that the applicant is entitled to general damages, aggravated damages and exemplary damages for infringement of her constitutional rights, deliberately refusing to deploy the applicant as its mandatory obligation since October 1st 2012, humiliation, stress, distress, mental anguish pegged at UGX. 800,000,000=.
- h) An order directing the respondent to calculate and pay the applicant all the remunerations from the time she was referred to the office of the Executive director up to the time she takes up her Job employment.

The grounds of this application as stated in the affidavit sworn by TUSIIME DOREEN the applicant are briefly stated as follows; that,

- The applicant was notified of her appointment as officer prosecution at Kampala Capital City Authority on 1st October 2012 and immediately reported to the respondent for her deployment.
- That the respondent halted the deployment and advised the applicant to wait for the financial year 2013/2014 claiming non availability of funds.
- That the respondent in the financial year 2014/2015 again halted the deployment of the applicant on allegation of non availability of funds and advised the applicant to wait for the following financial year.
- That the respondent in the financial year 2016/2017 finally made a formal decision halting the applicant's deployment sine die on allegation of non availability of funds.
- That the respondent in the financial year 2012/2013 managed to recruit other employees who were appointed at the same time and on the same post with the applicant that is one Atugonza Jacqueline and Shamim Malende but not the applicant.
- That the respondent herein has never accorded the applicant the right to be heard before reaching the decision to halt her deployment for over four years as officer Prosecution at Kampala Capital City Authority.
- The respondent's decision is inconsistent with Articles 21, Article 28 (1) of the Constitution of the Republic of Uganda and therefore illegal.

At the hearing of this application, the applicant was represented by Mr. Nuwagira Gerald and the respondent was represented by Mr. Dennis Byamukama.

In her submissions, learned counsel for the applicant stated that the applicant applied for the post of Officer Prosecution and after successfully passing through the several interviews she was subjected to, she was notified by the Public Service Commission that she had been offered the job and should report to the respondent's Director for further instructions.

It was stated that the applicant resigned from her Job at that time and reported to the respondent ready to be deployed and carry out her duties where upon she was informed by the Director Human Resource that her deployment had been halted due to non-availability of funds.

That the halt of the applicant's deployment for a period of four years was always made verbally until the 6th of October 2016 when the respondent finally communicated officially to the applicant its position in writing. It was also submitted that the applicant's two colleagues, one Atugonza Jacqueline and Shamim Malende with whom she successfully passed interviews were deployed immediately without delay.

The applicant and respondent raised the following agreed issues for this court's determination. These are;

1. Whether the respondent's decision and action can be challenged in a Court of Law by way of Judicial Review.
2. Whether or not the respondent acted illegally, irrationally and with procedural impropriety by deliberately failing to deploy the applicant for a period of over 4 years.
3. Whether the applicant is entitled to the reliefs/remedies sought.

ISSUE ONE: Whether the respondent's decision and action can be challenged in a Court of Law by way of Judicial Review?

On this issue, counsel for the applicant stated that the respondent is a Public body established under an Act of Parliament and it is not in dispute that the respondent on 29th July 2016 made

a decision of halting the deployment of the applicant as Officer Prosecution sine die and only communicated to the applicant on 6th October 2016.

That the application for Judicial Review was filed on the 18th day of October 2016 about 14 days later. Counsel for the applicant also argued that even if the letter communicating the impugned decision had not been served, the application would still be in time because the applicant was kept hopeful without giving up. Therefore her cause of action was continuous and could not arise while she still believed the information the Director Human Resource was verbally giving her.

On the other hand, counsel for the respondent asserted that according to rule 5 (i) of the Judicial (Judicial Review) rules 2009, an application for Judicial Review shall be made promptly and in any event within three months from the date when the grounds of the application first arose unless the court considers that there is a good reason for extending the period within which the application shall be made.

Counsel for the respondent submitted that according to the applicant, she was notified on October 1, 2012 and that the respondent was duty bound to appoint her within one month which was not done. That in this case, the date on which the alleged grounds of the application for Judicial Review first arose on November 1, 2012 and the three months period expired on February 1, 2013.

Counsel emphasized that this application was filed on October 18, 2016 and simple mathematics shows that the applicant filed the application more than three years when the alleged grounds of the application for Judicial Review first arose. He thus concluded that the instant application is time barred and it is incompetent and thus prays for this court to dismiss the same.

I have considered the submissions of both learned counsel in regard to this issue. It is true that an application for Judicial Review should be made promptly within three months as provided by rule 5 (1) of the Judicature (Judicial Review) Rules. This has been re-echoed in

the case of **Adinani Kawooya Vs Jinja Municipal Council Misc. Cause No.056 of 2011** where it was held that;

“It was not disputed that under rule 5 (1) of the Judicature (Judicial Review) Rules SI 11 of 2009 it is mandatory that an application for Judicial Review be made promptly and in any event within 3 months from the date when the grounds of the application first arose unless court considers that there is a good reason for extending the period within which the application shall be made.” (emphasis mine)

Counsel for the respondent cited the case of **James Basiime Vs Kabale District Local Government Misc. Application No.20 Of 2011** where Justice Kwesiga held that;

“In my view, the statutory provision requires that for the application for Judicial Review to be valid, it must be filed not later than three months from the date when the matter or grounds complained of, or the cause of action arose.”

In the present case, it is clear that the applicant had been kept in anticipation of deployment for a long time and she was repeatedly advised to keep checking at the office of the Director Human Resource and she complied.

It is further shown that the applicant’s demands for official written communication fell on deaf ears and the applicant even sought the assistance of the Labour Officer to secure her appointment but all was in vain.

Counsel for the respondent has argued that the time begun to run on the date on which the alleged grounds of the application first arose on November 1, 2012 but it should be noted that this court will only consider the official communication the applicant received from the respondent since 2012 which is the letter dated 29th July 2016 and was served upon the applicant on 6th October 2016.

Rule 5 (1) of The Judicature (Judicial Review) Rules, of SI 11 of 2009 emphasises that the application should be made within 3 months from the date when the grounds of the

application first arose and in this case, the grounds first arose when the applicant received an official communication from the respondent that her deployment had been halted sine die.

In this case therefore, it is my finding that time began to run on 6th October 2016 when the applicant received an official communication that her deployment had been halted. Since this application for Judicial Review was filed on the 18th day of October 2016 about 14 days after. It was filed within the mandatory period of 3 months.

ISSUE 2: Whether or not the respondent acted illegally, irrationally and procedural impropriety by deliberately failing to deploy the applicant for a period of over 4 years?

In determining this issue, this court will subdivide these grounds of Judicial Review as stated above.

ILLEGALITY:

Counsel for the applicant submitted that in order for one to succeed in an application for Judicial Review, he or she has to satisfy court that the matter complained of is tainted with illegality, irrationality and procedural impropriety. Counsel for the applicant submitted that Illegality arises when a decision subject to review is made contrary to the law empowering the decision maker.

That Section 25(2) of the KCCA Act 2010 makes the Public Service Commission as the appointing Authority in KCCA for persons below the rank of Head of Department. That in exercising this responsibility, the Public Service Commission is guided by the Uganda Public Service Standing Orders and the Public Service Commission Regulations of 2009. Counsel cited Section A-C 3(b) of the Public Service Standing Orders which provides that **appointment in the Public Service shall be subject to the availability of funds in the approved estimates.**

Further that Regulation 26(1) of the Public Service Commission Regulations provides for notification of a vacancy to the Secretary/ Public Service Commission by the responsible

officer upon clearance by the responsible Permanent Secretary. In declaring a vacancy, the accounting officer is expected to confirm on the relevant form that the Budget exists for the recruitment.

That in line with the above, Regulation 29 (i) of the Public Service Commission Regulations provides that where a vacancy has been filled by the appointing authority, the secretary shall notify the successful candidate and the responsible officer shall issue a letter of offer or appointment within one month from the date of approval of appointment.

It was counsel's submission that it was mandatory for the respondent to issue an appointment letter within one month and had no reason to keep quiet and not give the applicant a fair hearing before it arrived at the decision as it did and deliberately failing to reply the various correspondences of the applicant to the respondent as she struggled to secure her deployment.

It was not denied that the applicant's two colleagues were deployed and she was left out without any reason whether verbal or in writing. Even when one of her colleagues resigned, one Shamim Malende, the respondent failed to deploy the applicant. This assertion was not rebutted by the respondent in the affidavit in reply.

On the other hand, counsel for the respondent submitted that no order of certiorari can issue unless it is premised on a decision of a body that was mandated to determine a dispute. That the applicant in her pleadings and submissions failed to adduce evidence that the respondent was availed sufficient funds to implement its approved structure by the Government.

Counsel also argued that the said letter of 26th July 2016 to the applicant marked "I" to the affidavit in support of the application does not amount to a decision but merely further notification to the applicant of the respondent's inability to deploy her service due to inadequate funds. He asserted that it is not only the applicant who has not yet been deployed but 288 persons are affected and this fact is not denied by the parties.

It is also counsel's submission that the applicant would only be entitled to file this application for Judicial Review if her employment services with the respondent were terminated by the respondent without affording her a fair hearing.

I have considered submissions and the Law cited by both counsel on this issue and will go ahead and resolve whether there was an illegality or not committed by the respondent. However I cannot delve into this issue without stating the principles relating to Judicial Review.

It is important to restate Article 42 under which this application is brought under. It states;

“Any person appearing before an administrative official or body has a right to be heard justly and fairly and shall have a right to apply to a Court of Law in respect of any administrative decision taken against him or her”.

This same right has since then been observed to be a non-derogable right under Article 44 (c) of the said Constitution. See the case of **Charles Kabagambe Vs UEB Misc. Application No. 28 of 1999.**

V. F Musoke Kibuuka in **Misc. Cause No 78 of 2009** on Judicial Review process had this to say;

“Judicial Review is a process through which the High Court exercises its supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other public bodies or persons.

In deciding a Judicial Review application, the court is not concerned with the merits of the decision in respect of which the application is made. It is more concerned with the lawfulness of the decision making process. The court is more concerned with whether the decision constituting the subject matter of the application for Judicial Review was made through error of law, procedural impropriety, irrationality or outright abuse of Jurisdiction generally.”

The grounds upon which a grievance for Judicial Review is based are illegality, irrationality and procedural impropriety. See the case of **John Jet Tumwebaze Vs Makerere University**

Council & Ors CA No.78 of 2005. For an applicant to succeed in an application for Judicial Review he or she must prove that the decision or the act complained of is illegal, irrational or procedural improper.

Using this wide Interpretation of Judicial Review, it becomes clear that the High court exercises its supervisory powers on decisions of inferior courts or tribunals and it is concerned with the lawfulness of the decision making process.

As already submitted by counsel for the applicant illegality arises when a decision is made contrary to the law empowering the decision maker and the test is whether the decision maker has acted or not acted within the law. See the case of **Nazarali Punjwani Vs Kampala District Land Board & Anor HCCA No.7 of 2005 at page 18.**

Therefore in order to establish an illegality the appointing authority's decision ought to have been ultra vires.

In this case, counsel for the applicant cited very important regulations of the Public Service Commission Regulations which are vital in disposing of this matter.

Section 25 (2) of the KCCA Act 2010 establishes the Public Service Commission as the appointing Authority in KCCA for persons below the rank of Head of Department. In exercising this responsibility, the Public Service Commission is guided by the Uganda Public Service Standing Orders and the Public service Commission Regulations of 2009. Counsel cited Section A-C 3 (b) of the Public Service Standing Orders which provides that **appointment in the Public Service shall be subject to the availability of funds in the approved estimates.**

On the other hand, learned counsel for the respondent has argued that Government failed to provide the necessary funds to recruit the successful applicants including the applicants to cover their Wage Bill and Recruitment of Staff under the approved structure of the respondent. That the respondent was advised in Financial Year 2012/13 to rationalise its

budget allocation for the Financial Year 2012/2013 and use part of the Non Tax Revenue to finance the implementation of the approved structure with the most critical posts until additional resources are realised.

However, Regulation 26 (1) of the Public Service Commission Regulations provides for notification of a vacancy to the Secretary/ Public Service Commission by the responsible officer upon the clearance by the responsible Permanent Secretary. In declaring a vacancy, the accounting officer is expected to confirm on the relevant form that the Budget exists for the recruitment.

In this case, the first illegality committed by the respondent is advertising for the above posts and yet there was no assurance of enough funding from the Government which was contrary to Regulation 26 of the Public Service Commission regulations.

As stated by counsel for the applicant, before a vacancy is declared for advertisement due diligence must be carried out to ensure that there are necessary funds for the vacancy and in this case the respondent just advertised without funds. This amounted to an illegality.

As rightly pointed out by learned counsel for the applicant by carrying out the recruitment process it proved that the respondent was reckless in spending Government funds on unnecessary recruitment yet the respondent had no reason to subject someone to an interview and even go ahead to issue a notification of appointment to the applicant well aware that she would not be employed. This act of not carrying out due diligence to establish if funds existed and going ahead to advertise for different vacancies was ultra vires the law and hence an illegality.

The second illegality committed by the respondent was failure the respondent to issue an appointment letter within the mandatory one month from the date of approval of appointment. Regulation 29(1) of the Public Service Commission Regulations provides that where a vacancy has been filled by the appointing Authority, the Secretary shall notify the successful candidate and the responsible officer **shall issue a letter of offer or appointment within one month from the date of approval of appointment.**

As already observed the applicant's two other colleagues were deployed and she was left out without any reason whether verbal or in writing. It was after the applicant had tasked the respondent several times to explain why she was not appointed that she was given a reason of non availability of funds. Therefore, this illegality stems from the fact that the applicant was not given an appointment letter one month from the date of approval of appointment.

IRRATIONALITY:

According to the case of *John Jet Tumwebaze Vs Makerere University Council & Ors CA No.78 of 2005* it was held that irrationality is when a decision made is so outrageous in its defiance of logic or acceptable moral standards that no person could have arrived at that decision.

The issue of irrationality is observed when the respondent made a decision to halt the deployment of the applicant for over 4 years when all her two colleagues in the same position were deployed. It is also noted and asserted by counsel for the applicant which assertion was not rebutted by the respondent that even when one of her colleagues resigned; one Shamim Malende, the respondent failed to deploy the applicant.

One wonders which criteria the respondent used to appoint and deploy the two other colleagues and leave out the applicant. If the non deployment was due to lack of funds why then didn't they deploy the applicant when one of the people appointed resigned? This is an outright manifestation of discrimination against the applicant who was never appointed because of some reasons best known to the respondent.

Counsel for the respondent has submitted that the notification to the applicant regarding her appointment to the Public Service attests to the issue of the applicant's eligibility to employment. That the Public Service Commission does not deploy on behalf of the respondent but it establishes suitability of the candidate for the Job and the decision to employ rests on the agency on whose behalf the interview is done. That this in other words means that the final decision to employ successful candidates after being interviewed by Public Service Commission rests on the respondent in this particular case.

I totally disagree with the above assertion because Rule 29 (1) of the Public Service Commission Regulations provides that where a vacancy has been filled by the appointing authority, the Secretary shall notify the successful candidate and **the responsible officer shall issue a letter of offer or appointment within one month from the date of approval of appointment.**

This provision is mandatory in its wording and it does not give room to the respondent to make a decision in its appointment after the successful candidate has met the requirements. This provision also means that Public Service directs the respondent on who to employ and directs the respondent to issue the successful candidates with appointment letters within a period of one month. It thus follows that the fact that the applicant was always kept hopeful that she would be deployed for a period of 4 years and afterwards her appointment was turned down was so illogical and outrageous a decision because the respondent was mandated to seek for recruitment after ascertaining availability of funds.

PROCEDURAL IMPROPRIETY:

Procedural Impropriety is when rules and principles of natural justice or failure to act with Procedural fairness are not observed by the decision maker to the prejudice of one affected by the decision. It also covers non-observance of the Procedural rules in the empowering legislation and its test is whether the duty to act fairly and the right to be heard were observed. See the case of **Nazarali Punjwani Vs Kampala District Land Board & Anor** (supra).

Articles 42 and 28 (1) of the Constitution provides for natural Justice in the determination of the applicant's rights. The non-observance of natural Justice here is that the respondent on several occasions was tasked by the applicant to be deployed but the applicant's correspondences were always ignored. The applicant who was a successful candidate was never invited to an open table and given an explanation showing that there were no funds but instead they kept tossing her for a period of 4 years. This cannot be natural justice. It is noted that the respondent did not furnish any explanation in respect to paragraph 16 of the affidavit

in support and when one of her colleagues one Shamim Malende resigned she was still not called for deployment.

Further to this, as stated by counsel for the applicant, the respondent's failure to adhere to its mandatory obligation to issue an appointment letter within one month from the date of approval of the appointment as provided under Rule 29 (i) of the Public Service Commission Regulations was procedurally improper. The correct procedure would have been to issue the applicant with the appointment letter within a month and then a written communication showing that her appointment is halted until a further date because of some reasons. I therefore find that the respondent faulted in the procedure by not issuing the applicant an appointment letter.

Counsel for the respondent has submitted that the case at hand is an employment matter which is not subject to Judicial Review but should be brought under employment law.

According to the case of *Charles Kabagambe Vs UEB Misc. Application No.28 of 1999.* Judicial Review was defined as a process through which the High Court exercises its supervisory jurisdiction over **proceedings** and **decisions of** inferior courts, tribunals and other **Public Bodies** or persons. [Emphasis mine.]

The above definition envisages any decision made by a public body whether under employment or not. It is not in dispute that the respondent is a public body and that the respondent made a decision to halt the applicant's deployment sine die. So such a decision to halt the applicant's deployment sine die is subject to Judicial Review whether it is an employment matter or not .

ISSUE 3: Whether the applicant is entitled to the remedies sought?

According to Section 36(1) of the Judicature Act, the High Court has discretionary powers to grant prerogative remedies which include certiorari and mandamus.

An order of certiorari issues to quash a decision which is ultra vires or vitiated by an error on the face of the record. In this case the respondent acted ultra vires the law by advertising for the vacancy without enough resources and further refused to issue the applicant with her appointment letter for a period of 4 years and yet the law provides for a period of one month. This court therefore issues an order of certiorari to quash the decision because it was illegal.

An order of mandamus is issued to compel performance of a Statutory Duty and in this case the Statutory Duty includes appointing and deploying the applicant as an officer prosecution at Kampala Capital City Authority.

Rule 8 of the Judicial Review Rules allows the applicant to claim for general damages. In this case since the respondent failed to issue an appointment letter to the applicant, discriminated her by employing her other two colleagues and leaving her out, and the applicant writing several correspondences which were never replied, it caused the applicant mental distress, humiliation loss of earnings and anxiety which can only be compensated by damages.

Therefore in summary, this Court makes the following orders;

- i) A declaration that the respondent's decision dated 29th July 2016 is illegal and inconsistent with Article 42 and 21 of the Constitution of the Republic Of Uganda.**
- ii) A declaration that failure by the respondent to adhere to its mandatory obligation to issue an appointment letter within one month from the date of approval of the appointment under Rule 29 (1) of the Public Service Commission Regulations SI No. 1 of 2009 amounted to an illegality.**
- iii) An order of certiorari doth issue quashing the respondent's decision of halting the deployment of the applicant as officer prosecution at Kampala City Council Authority and that the said decision is ultra vires and void abinitio.**
- iv) An order of certiorari doth issue quashing the respondent's decision of halting the deployment of the applicant sine die for being unreasonable in Wednesbury's sense.**

- v) **An order of mandamus doth issue compelling the respondent to deploy the applicant forthwith as officer prosecution at Kampala Capital City Authority without any further delays.**
- vi) **The applicant shall be paid compensation as damages equivalent to the net salary she would have earned from the date of notification of appointment i.e. 1st October 2012 to the date of judgment**
- vii) **The respondent should also meet the costs of the suit since the applicant is the successful party.**

Stephen Musota

J U D G E

04.04.2017